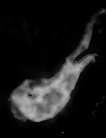

QUESTIONS PRESENTED

1. Whether the First Amendment protects government contractors from contract termination or other adverse contract action based on their publicly expressed viewpoints.

2. Whether *Pickering* v. *Board of Educ.*, 391 U.S. 563 (1968), governing the First Amendment rights of government employees, is applicable to government contractors.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1654

GLEN HEISER AND GEORGE SPENCER, PETITIONERS

v.

KEEN A. UMBEHR

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case concerns the extent to which the First Amendment restricts the ability of government to rely upon a person's publicly expressed viewpoints in making decisions relating to contracting with that person. The United States has a substantial interest in the preservation of constitutional rights of free expression. As the nation's largest single public purchaser of goods, services and property, the United States also has a substantial interest in the constitutional standards governing the circumstances in which government may take speech into account in its contracting determinations.

STATEMENT

Respondent, Keen A. Umbehr, the operator of a trash hauling business, sued petitioners Glen Heiser and George Spencer, members of the Board of the Wabaunsee (Kansas) County Commission, alleging that they violated the First Amendment by terminating his trash hauling contract with the county in retaliation for his criticisms of county government at public meetings, and in letters and columns in local newspapers. J.A. 21-24. The district court held that the First Amendment does not protect government contractors from termination of their contracts based on their speech. The court of appeals reversed, holding that the First Amendment protects public contractors to the same extent that it protects public employees from adverse action based on speech.[1]

1. Kansas law obligates each county in the State to make a plan for solid waste disposal, and the contract at issue was developed pursuant to the county's waste disposal plan. Respondent is an independent contractor doing business as Solid Waste Systems. In 1981, respondent bid on and was awarded the county trash collection contract, and the parties revised and renewed the contract in 1985. The contract gave each of the seven towns in the county the opportunity, by ratifying the contract, to use respondent as its exclusive residential trash hauling service at a specified per-residence price. Any town that elected not to ratify the contract remained responsible for its own trash collection, and each ratifying

[1] The district court's decision was rendered in response to petitioners' motion for summary judgment. The court was therefore required to view the evidence and all justifiable inferences therefrom in the light most favorable to respondent. See *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1987). This statement of the facts reflects that procedural posture.

town retained the right to opt out of the contract on 90 days' notice. The contract also gave respondent the right to dispose of the collected waste in the county landfill at a rate established by the county and incorporated in the contract. The contract provided that it was to be automatically renewed annually, unless a party gave 60 days' notice of intent to terminate, or 90 days' notice of intent to renegotiate. J.A. 12-13, 21-24; see also C.A. App. 106-113 (contract).[2]

The contract specified that "[i]t is mutually agreed and understood that the contractor is an independent contractor and that he, his agents, and employees are not agents or employees of the County or any City." C.A. App. 108. The contractor was expected to use his own personnel and equipment, and the contract specified that his vehicles must have "clearly visible on each side the name and phone number of the contractor." *Id.* at 109. The contractor was required to deal with the county's designated solid waste administrator on all issues relating to the contract. *Id.* at 110. Six of the seven towns in the county ratified the contract, and respondent hauled trash for them for approximately ten years. J.A. 21-22.

During 1989, respondent was increasingly outspoken in his public criticisms of county government and the Board of County Commissioners.[3] He "spoke out at county commission meetings and wrote letters and columns in local

[2] References to "C.A. App." are to the Appendix to Brief of Appellant in the court of appeals. Appellees filed a separate Appendix in the court of appeals, which is referred to herein as "Appellees' C.A. App."

[3] The opinion of the district court states that respondent spoke out "throughout the 1980s and in 1990," J.A. 13, but the record suggests that respondent publicly expressed his criticisms of the county primarily beginning in 1989.

newspapers about a variety of topics, including landfill user rates, the cost of obtaining county documents from the county, alleged violations by the county commission of the Kansas Open Meetings Act, and a number of alleged improprieties, including mismanagement of taxpayer money, by the county road and bridge department." J.A. 22.

Several of respondent's criticisms appeared in letters to the editors of the local newspapers, or in his newspaper column, "My Perspective," published from February, 1989, through June, 1990. Respondent publicly assailed the county's practices of charging both per-page and hourly labor charges for copying public records, and imposing a three-day waiting period for copies, which he viewed as impediments to citizens' lawful access to public information. C.A. App. 56, 72. He contended that the policy on copies violated the Kansas Open Records Act, Kan. Stat. Ann. (K.S.A.) §§ 45-215 *et seq*. (1993 & Supp. 1994), C.A. App. 73, 77.[4] Respondent also publicly questioned the accuracy of official minutes of meetings of the Board of County Commissioners, *id*. at 66, 70, and accused the Board of having violated the Kansas Open Meetings Act (KOMA), K.S.A. §§ 75-4317 *et seq*. (1989 & Supp. 1994), by repeatedly holding closed-door sessions on controversial issues, C.A. App. 67, 68, 71, 73, 83.[5]

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[4] In response to respondent's allegations, the county attorney concluded that the Board should change its policy. Appellees' C.A. App. 537.

[5] An Attorney General investigation of alleged KOMA violations resulted in a consent decree between the Attorney General and the commissioners in which the commissioners acknowledged that they had violated the Act, agreed to conduct all future meetings in compliance with the Act, and also agreed to conduct a public meeting regarding the requirements of the Act. Appellees' C.A. App. 160-162.

Respondent also argued publicly against closing the county landfill, see C.A. App. 57, 58, 61, 66, and criticized landfill user rate hikes. Although respondent acknowledged a need for increased landfill user rates, *id*. at 120-121, he opposed the size of the proposed increases as unjustified, *id*. at 77, 78, 81, 82, 84, 85, 121.[6] Respondent further asserted that the county road and bridge department misused public resources by, among other things, using county equipment to assist a private construction company on a private job. *Id*. at 60, 61, 62, 64.[7]

Petitioners reacted negatively to respondent's public expression of his views. Petitioner Heiser stated at a May 31, 1989, Board meeting that he found respondent's newspaper articles offensive and suggested they should be "censored," and that the official county newspaper, the Signal-Enterprise, should "take a second look at what is put in the paper, to avoid anyone getting into trouble."

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[6] Respondent challenged the rate increase in state court. The District Court of Wabaunsee County, noting that a commissioner had acknowledged that the calculation of the proposed new rates was "a shot in the dark," held that the commission had not established a proper factual basis for the new rates and granted respondent's request for a temporary injunction. C.A. App. 121. On the merits, the court found that the rate increase was unreasonable and arbitrary. See *Umbehr v. Board of County Comm'rs*, 843 P.2d 176, 178 (Kan. 1992). The Kansas Supreme Court reversed on the ground that the state courts lacked jurisdiction to review the commission's action. *Id*. at 181-182.

[7] The Kansas Attorney General conducted an investigation into alleged misuse of county property and concluded in December, 1989, that the county had "loose administrative practices and accounting procedures," had "not had adequate controls on the disposition of gasoline, oil and other consumable supplies from the county facilities," and failed adequately to document projects undertaken with county equipment that benefit private citizens. The Attorney General also concluded, however, that there was "no misconduct or neglect of duty on the part of any county commissioner." Appellees' C.A. App. 157-159.

C.A. App. 92; see *id.* at 69.[8] Petitioner Spencer said that he would like to see some of respondent's newspaper articles eliminated, *id.* at 88, and that the newspaper's editors should "take out anything that was offensive," *id.* at 90. Spencer stated that he believed that the trash hauling contract gave respondent a "platform" to cause problems for the county because, as Spencer put it, "as long as we had the contract with him that gave him the excuse to come into our meetings." *Id.* at 89.

The Board voted in February, 1990, to terminate respondent's contract. J.A. 23.[9] The vote was legally defective, however, because the resolution mistakenly referred to the defunct 1981 contract instead of the then-current 1985 contract. See Appellees' C.A. App. 164. In January, 1991, the Board voted again and successfully terminated the contract. J.A. 23.

2. Respondent brought suit under 42 U.S.C. 1983 in the United States District Court for the District of Kansas, alleging that the county commissioners' termination of his contract in retaliation for his speech violated the First Amendment. Following discovery, the district court granted petitioners' motion for summary judgment. J.A. 10-20. In light of the evidence submitted at the summary

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[8] The editor of the Signal Enterprise noted in a front-page commentary on June 8, 1989, that he had been threatened at the Board of Commissioner's meeting and "criticized for not screening the articles of Keen A. Umbehr." Appellees' C.A. App. 154.

[9] The minutes of the Board meeting reflect no discussion of the reasons for termination except that "Commissioner Spencer stated that the present agreement with Solid Waste Systems on the County Contract and the contract with the cities indicate a number of officials who are no longer in office and with this in mind, Commissioner Spencer made a motion to open the Solid Waste Contract for bid this year." Appellees' C.A. App. 164.

judgment stage, the court assumed that "[respondent's] comments did motivate the votes in favor of terminating [respondent's] contract with Wabaunsee County." J.A. 14.[10] It determined that, "if [respondent] had been a government employee, he would have been protected from termination in retaliation for his statements." *Ibid.* The court nonetheless concluded that "the First Amendment does not prohibit defendants from considering plaintiff's expression as a factor in deciding not to continue with the trash hauling contract at the end of the contract's annual term." *Ibid.* In the court's view, respondent's contractor status was determinative: "[A]s an independent contractor, [respondent] cannot claim that his First Amendment rights were violated by the alleged retaliatory termination of his contract with Wabaunsee County." J.A. 17-18.[11]

3. The court of appeals reversed. J.A. 21-39. The court held that "an independent contractor is protected under the First Amendment from retaliatory governmental action, just as an employee would be. Thus, the *Pickering* [v. *Board of Educ.*, 391 U.S. 563 (1968),] balancing test would apply to such a retaliatory action." J.A. 37. The court observed that "in its role as sovereign, the

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[10] See also C.A. App. 24 (joint pretrial order identifying as a material issue in dispute "[w]hether the exercise by plaintiff of his First Amendment rights was a substantial motivating factor in the termination of plaintiff's contract with the Board of County Commissioners.").

[11] Respondent sued the third member of the three-person county commission, Joe McClure, in his individual capacity only. The district court dismissed the individual-capacity claims against each commissioner based on qualified immunity, J.A. 18, and also granted summary judgment for McClure because, unlike Spencer and Heiser, he did not vote in favor of terminating respondent's contract, J.A. 19. The court of appeals affirmed as to McClure on both grounds. J.A. 38. McClure thus is not a party before this Court.

government cannot punish or otherwise burden the speech of citizens criticizing the government, except in very limited circumstances." J.A. 34. When government acts as employer, it "can only punish or burden speech of its employees criticizing the government when it shows that such speech interferes with the government's ability to function." *Ibid.* Permitting government to burden independent contractors' speech without any showing of interference with the government's ability to function would "accord those who contract with the government a lesser degree of First Amendment protection than ordinary citizens enjoy vis-a-vis their government or than government employees enjoy vis-a-vis their employer." *Ibid.* The court rejected that anomalous result.

In *Elrod* v. *Burns*, 427 U.S. 347 (1976), *Branti* v. *Finkel*, 445 U.S. 507 (1980), and *Rutan* v. *Republican Party of Illinois*, 497 U.S. 62 (1990), this Court held that governmental employment decisions made on the basis of political party affiliation are presumptively unconstitutional under the First Amendment. In reaching its decision in this case, the court of appeals noted (J.A. 30-31) that several courts of appeals had viewed those patronage decisions as inapplicable outside the employment context, and had thus upheld patronage contracting practices against First Amendment challenges. *E.g.*, *Horn* v. *Kean*, 796 F.2d 668 (3d Cir. 1986) (en banc); *LaFalce* v. *Houston*, 712 F.2d 292 (7th Cir. 1983), cert. denied, 464 U.S. 1044 (1984). The court of appeals stated its disagreement with the analysis of those courts in limiting the employee-patronage decisions,[2] and commented that, in any event, decisions

[2] The court of appeals analyzed at length and expressly rejected the two principal rationales upon which the *Horn/LaFalce* line of cases distinguished the patronage-employment decisions in upholding patronage-based contracting. Those courts relied in part on a footnote in *Branti*, 445 U.S. at 513 n.7, specifying that "the only practice at issue" in both *Elrod* and *Branti* was "the dismissal of public employees for partisan reasons," and that the case thus did not involve other patronage practices, including "granting supporters lucrative government contracts." See *Horn*, 796 F.2d at 674; *LaFalce*, 712 F.2d at 294-295. In the court of appeals' view, however, *Rutan* "undermined the rationale of *Horn* and *LaFalce* that relied upon the Supreme Court's reluctance to extend *Elrod* and *Branti*." J.A. 34-35.

The court of appeals was also unpersuaded by the contention that patronage contracting is not subject to constitutional scrutiny because independent contractors "have less at stake" in their public contracts than public employees have in their jobs. J.A. 35; see also J.A. 32. The court "reject[ed] any categorical distinction based on whether independent contractors have more or less of an economic interest in their governmental contracts, both because such categorical distinctions are impossible to make and because, in this context, they are irrelevant." J.A. 36.

dealing with patronage employment practices have "limited relevance to whether independent contractors should be protected against retaliation for speech on matters of public concern." J.A. 37.

SUMMARY OF ARGUMENT

The decision of the court of appeals should be affirmed based on a straightforward application of this Court's established unconstitutional-conditions doctrine. When a private business is hired to haul trash for a county government, the First Amendment prohibits the government from terminating that contract because the owner of that business criticizes the government at public meetings and publishes newspaper articles critical of the county. "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964). Such speech lies at the heart of First Amendment protection. There is no question that the First Amendment prohibits

viewpoint-based discrimination against an individual because of that person's political expression in public fora such as newspapers and open meetings of government bodies. See *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972).

The fact that in this case respondent's expression was not punished directly by a fine or other penalty, but by termination of a public contract that he otherwise would have retained, does not change the result. As the court of appeals correctly recognized, "permitting governments to terminate a public contract because of the contractor's speech" permits them "to accomplish indirectly that which they cannot accomplish directly—punishment of speech that they do not like." J.A. 33-34. A decision to grant or withdraw a public contract because of the publicly expressed viewpoints of the contractor generally should be treated, like a viewpoint-based decision to grant or withdraw any other government benefit, as presumptively unconstitutional. See, *e.g.*, *Rosenberger* v. *Rector*, 115 S. Ct. 2510, 2516-2520 (1995).

The simplicity of this case is obscured by petitioners' and the lower courts' reliance on two inapplicable lines of First Amendment cases—those relating to political patronage, and those recognizing the special prerogatives of government to regulate the speech of public employees. As petitioners acknowledge (Pet. Br. 15), this is not a political patronage case; respondent was terminated because of the critical viewpoint of his public expression, not because of his political party affiliation. Thus, although some circuits have held that there is no First Amendment obstacle to awarding public contracts as a form of political patronage, the district court erred in relying on those cases (J.A. 14-16) to hold that respondent lacked any First Amendment rights against termination

of his contract in retaliation for the public expression of his critical views.

Although the court of appeals was correct in recognizing that respondent is not completely without First Amendment protection, the court of appeals in our view invoked the wrong First Amendment analysis in holding that *Pickering* v. *Board of Educ.*, 391 U.S. 563 (1968), provides the proper test on remand. Respondent was not a public employee, and the county lacked the authority to regulate his speech to the same extent that it may, under *Pickering*, regulate the speech of government employees. *Pickering* appropriately applies to contractual relationships that involve supervision of contract performance by the government similar to governmental supervision over employee subordinates. Where, as here, however, the kinds of relationships the *Pickering* test aims to protect are absent, that test is inapplicable.

Petitioners have not, moreover, asserted that respondent's speech was not on matters of public concern, or that it interfered with the efficient performance of respondent's contract. Therefore, even if *Pickering* applied, petitioners lacked any valid justification for reacting to respondent's speech by terminating his contract. The sole task for the finder of fact on remand should therefore be to decide whether opposition to respondent's speech did, indeed, motivate petitioners and, if it did, to enter judgment in respondent's favor.

ARGUMENT

I. THE CONSTITUTION PROHIBITS THE COUNTY FROM TERMINATING RESPONDENT'S GOVERNMENT CONTRACT IN RETALIATION FOR HIS SPEECH

The First and Fourteenth Amendments prohibit petitioners from terminating respondent's public contract in retaliation for his public statements critical of the county and its Board of Commissioners. It is firmly established that government may not withdraw a benefit because the recipient expresses viewpoints objectionable to government officials.[13] Denying government contracts based on the viewpoint of contractors' public expression "is in effect to penalize them for such speech. Its deterrent effect is the same as if the [government] were to fine them for such speech." *Speiser* v. *Randall*, 357 U.S. 513, 518 (1958). Last Term in *Rosenberger* v. *Rector*, 115 S. Ct. 2510 (1995), this Court reaffirmed the basic principle that government benefits cannot constitutionally be conditioned on the views expressed by the recipient in exercising the right of free speech. *Rosenberger* invalidated under the Speech Clause the University of Virginia's refusal to authorize payments from the University's Student Activities Fund to support a student newspaper containing particular views. The Court accepted, as "compelled" by its own precedents, the University's acknowledgement that "[i]deologically driven attempts to

[13] See, *e.g.*, *Rosenberger* v. *Rector*, 115 S. Ct. 2510, 2516-2520 (1995); *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 113 S. Ct. 2141, 2147 (1993); *Arkansas Writers' Project* v. *Ragland*, 481 U.S. 221, 227-231 (1987); *FCC* v. *League of Women Voters*, 468 U.S. 364, 399-401 (1984); *Keyishian* v. *Board of Regents*, 385 U.S. 589, 606 (1967); *Speiser* v. *Randall*, 357 U.S. 513, 518 (1958).

suppress a particular viewpoint are presumptively unconstitutional in funding, as in other contexts." *Id.* at 2517. Petitioners' assertion (Pet. Br. 28) that "a retaliatory motive engendered by harsh political debate" is a constitutionally permissible basis upon which to terminate a public contract is flatly contradicted by the settled prohibition on unconstitutional viewpoint-based conditions.[14]

Petitioners emphasize that the trash hauling contract was terminable at will, Pet. Br. i, 11, but such a contract nonetheless cannot be terminated for unconstitutional reasons:

> [E]ven though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.

Perry, 408 U.S. at 597. Respondent's lack of a "right" to the trash hauling contract "is immaterial to his free speech claim." *Id.* at 598.

The Constitution does not, of course, place a person who engages in public protest or criticism in a better position than one who remains silent. Petitioners' principal contention is that application of the First Amendment in

[14] There are circumstances, not present in this case, in which the content of speech may constitutionally be considered in decisions regarding allocation of government funds. For example, this Court has "permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message." *Rosenberger*, 115 S. Ct. at 2518-2519.

this case would "tie the hands of responsible government officials," Pet. Br. 12, and "prevent the cancellation of * * * contracts so long as [the contractors] publicly criticize the public officials who control the decision to cancel or not," *id.* at 17. It has been long established, however, that no such consequences flow from recognition that government benefits cannot be conditioned on the surrender of First Amendment rights. This Court held nearly two decades ago, in *Mt. Healthy* v. *Doyle*, 429 U.S. 274 (1977), that a public employee who has exercised constitutional rights should be left "in no worse a position than if he had not engaged in the conduct," but also "ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of the decision." *Id.* at 285-286. Accordingly, if respondent shows on remand that his speech was a "motivating factor" in the Board's decision not to renew the contract, the Board will have the opportunity to prove "that it would have reached the same decision as to respondent's [contract] even in the absence of the protected conduct." *Id.* at 287.

Contrary to petitioners' contention, this case does not concern "decisions which are content neutral and which only incidentally burden speech." Pet. Br. 16; see *id.* at 26-27. The issue is whether, if petitioners voted not to renew respondent's contract because of his outspoken criticisms of the county on civic issues such as open public meetings, open public records, and landfill use, that vote violated respondent's First Amendment rights. The district court assumed, as it was required to do in view of the evidentiary record at the summary judgment stage, that "[re-

spondent's] comments did motivate the votes in favor of terminating [respondent's] contract with Wabaunsee County." J.A. 14. Under that assumption, the termination was a classic instance of viewpoint-based discrimination. See *Rosenberger*, 115 S. Ct. at 2516-2518; *Lamb's Chapel*, 113 S. Ct. at 2147. Petitioners may seek to prove on remand that respondent's comments did not play a motivating role in the Board's decision to terminate the contract. It is clear, however, that respondent has presented a claim of unconstitutional viewpoint discrimination.

II. THE ANALYSIS OF THIS COURT'S CASES RESTRICTING POLITICAL PATRONAGE IN PUBLIC EMPLOYMENT SUPPORTS RESPONDENT'S CLAIM

A. This Court's decisions restricting political patronage in the context of public employment have used a traditional unconstitutional-conditions analysis that supports respondent's First Amendment claim in this case. See *Rutan* v. *Republican Party of Ill.*, 497 U.S. 62 (1990); *Branti* v. *Finkel*, 445 U.S. 507 (1980); *Elrod* v. *Burns*, 427 U.S. 347 (1976) (plurality opinion). The Court has held that patronage-based employment decisions are presumptively unconstitutional because, like petitioners' viewpoint-based retaliation, they penalize the exercise of First Amendment rights.[8] Unless patronage practices

[8] "[C]onditioning employment on political activity pressures employees to pledge political allegiance to a party with which they prefer not to associate, to work for the election of political candidates they do not support, and to contribute money to be used to further policies with which they do not agree." *Rutan*, 497 U.S. at 69. Under a patronage system as described in *Elrod*, "[t]he threat of dismissal for failure to provide * * * support [for the favored political party] unquestionably inhibits protected belief and association, and dismisses

"are narrowly tailored to further vital government interests," they "impermissibly encroach on First Amendment freedoms." *Rutan*, 497 U.S. at 74. Only where "party affiliation is an appropriate requirement for the effective performance of the public office involved" may it be taken into account. *Branti*, 445 U.S. at 518.

As explained above, terminating respondent's contract in retaliation for his publicly expressed views similarly burdened his exercise of his First Amendment rights. Although respondent's claim involves neither political patronage nor public employment, it rests on the same basic constitutional analysis that this Court employed in *Rutan*, *Branti* and *Elrod*. The principle those cases apply is not limited to public employment or patronage, but applies generally where government conditions a benefit on the exercise of constitutional rights. See, *e.g.*, *Rosenberger*, *supra* (access to student activities funds cannot be conditioned on viewpoint expressed in student magazine); *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984) (eligibility for public broadcasting funding cannot be conditioned on broadcaster refraining from "editorializing" with own funds); *Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987) (unemployment compensation cannot be denied based on conduct mandated by religious belief); *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973) (eligibility for public contracts cannot be conditioned on waiver of Fifth Amendment privilege against self

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for failure to provide support only penalizes its exercise. The belief and association which government may not ordain directly are achieved by indirection." 427 U.S. at 359. See also *Branti*, 445 U.S. at 516 (referring to "the coercion of belief that necessarily flows from the knowledge that one must have a sponsor in the dominant party in order to retain one's job") (quoted in *Rutan*, 497 U.S. at 71).

incrimination); *Speiser*, 357 U.S. 513 (eligibility for tax exemptions cannot be conditioned on taking loyalty oath).

B. In reaching the opposite conclusion, the district court in this case followed the Seventh Circuit's decision in *Downtown Auto Parks* v. *City of Milwaukee*, 938 F.2d 705, cert. denied, 502 U.S. 1005 (1991). *Downtown Auto Parks* held that an independent contractor who operated city parking lots had no First Amendment protection when the city terminated his parking lot leases because he lobbied the state legislature. The court of appeals stated that "[t]he adjudicated cases in this Circuit do not extend First Amendment protection to independent contractors whose bids for public contracts are rejected on the basis of their political views." *Id.* at 708. The district court here similarly concluded that courts "do not extend to independent contractors the same First Amendment protections granted to government employees." J.A. 14.[16]

The district court, and the Seventh Circuit in *Downtown Auto Parks*, arrived at this conclusion by two steps, neither of which was correct. First, they relied on a line of appellate decisions holding that public contractors do not have the same constitutional protection against patronage practices in government contracting as this Court has held public employees have against patronage in government employment.[17] Second, without additional

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[16] The Second Circuit has since stated, in a case involving speech unrelated to political patronage, that it had not yet resolved whether to follow *Downtown Auto Parks*. *Planned Parenthood of Dutchess-Ulster, Inc.* v. *Steinhaus*, 60 F.3d 122, 128 (2d Cir. 1995). But see *White Plains Towing Corp.* v. *Patterson*, 991 F.2d 1049, 1057, 1061 (2d Cir.), cert. denied, 114 S. Ct. 185 (1993) (assuming that contractors may bring First Amendment claims, but finding no actionable claim on the facts).

[17] See J.A. 14-17 (citing *Triad Assocs., Inc.* v. *Chicago Housing Authority*, 892 F.2d 583 (7th Cir. 1989), cert. denied, 498 U.S. 845 (1990);

analysis, they extended those cases to hold that contractors who lack protection against political patronage also lack protection against viewpoint-based retaliation. See *Downtown Auto Parks*, 938 F.2d at 709 n.5. The court of appeals cases authorizing patronage contracting seem inconsistent with *Rutan*, *Branti* and *Elrod*. But even if one were to accept them as a constitutionally valid effort to preserve the non-employment aspects of traditional methods of political patronage, they would be inapplicable here, where viewpoint discrimination, rather than patronage, was involved.[18]

This is not a patronage case. As petitioners acknowledge, "[t]here has never been any suggestion that Mr. Umbehr's contract was terminated so that he could be replaced with a political ally." Pet. Br. 15.[19] Indeed, the record does not even reflect the litigants' political party affiliations. Petitioners did not terminate respondent's contract for patronage reasons, nor did they find a replacement for him on partisan political grounds. Thus, even if patronage in government contracting were to be held to be consistent with the First Amendment, that plainly would not justify petitioners' public-speech-based retaliation.

Horn v. *Kean*, 796 F.2d 668 (3d Cir. 1986) (en banc); *LaFalce* v. *Houston*, 712 F.2d 292 (7th Cir. 1983), cert. denied, 464 U.S. 1044 (1984); *Fox & Co.* v. *Schoemehl*, 671 F.2d 303 (8th Cir. 1982); *Sweeney* v. *Bond*, 669 F.2d 542, (8th Cir.), cert. denied, 459 U.S. 878 (1982)); *Downtown Auto Parks*, 938 F.2d at 708-710 (citing cases).

[18] The question whether patronage contracting is subject to First Amendment scrutiny is before the Court in the petition for a writ of certiorari in *O'Hare Truck Service, Inc.* v. *City of Northlake*, petition for cert. pending, No. 95-191 (filed July 31, 1995).

[19] Petitioners stated in the district court, too, that they were "the first to concede that no patronage was involved" in the termination of respondent's contract. Appellees' Supp. C.A. App. 657.

Political patronage and suppression of free expression are different practices. Political patronage refers to the use of party affiliation in the dispensation of government largesse, rather than to suppression of disfavored political speech.[20] This Court's political-patronage decisions uniformly refer to plaintiffs' "political affiliation," not their speech, as the basis for the challenged employment decisions.[21] The constitutional right involved in each of those cases was not the First Amendment right of employees to express themselves, but their right to freedom of political association.[22]

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[20] The *Random House Dictionary of the English Language* (1987) offers as one definition of "patronage" "the distribution of jobs and favors on a political basis, as to those who have supported one's party or political campaign."

[21] For example, the claim in *Elrod* was that the plaintiffs, Republican non-civil-service employees of the Cook County, Illinois, sheriff's office, were fired upon the election of a new sheriff (a Democrat), solely on the ground that they were not affiliated with or sponsored by the Democratic Party, and replaced with persons who were. 427 U.S. at 350. In *Branti*, a newly appointed Democratic public defender discharged Republican assistant public defenders based solely on their party affiliation. 445 U.S. at 520. Plaintiffs in *Rutan* were low-level state employees in Illinois who challenged the governor's policy of limiting all beneficial state employment decisions, including beneficial decisions as to promotion, transfer and recall, to supporters of the Republican Party. 497 U.S. at 66-67.

[22] In the context of public employment the Constitution affords different protections to political affiliation and political speech. For example, *Rutan* allows employment decisions regarding a confidential or high-level policymaking employee whose job requires political loyalty to be based on partisan political concerns. Such an employee, however, retains protection against speech-based retaliation insofar as the employee's speech is on matters of public concern and the employee's interest in the speech at issue outweighs the employer's interest in efficient and effective job performance. It is conceivable that a patronage case could also involve adverse action on the basis of

Accordingly, even if this Court were to accept the reasoning of the appellate decisions that have upheld patronage contracting, that would not lead to rejection of respondent's claim in this case. A rule aimed at protecting patronage practices in government contracting would not justify removing constitutional protection for contractors' public expression. Retaliation based on the viewpoint expressed in speech is not part of the historical tradition described by those who view patronage systems—because of their relationship to the two-party system—as a constitutionally permissible political choice.[23] The free expression of opinions on public issues, such as respondent's public statements and written editorials, has fulfilled an "historic function in this nation" by "informing and arousing the public, and by criticizing and cajoling those who hold government office in order to help launch new solutions to the problems of the time." *FCC* v. *League of Women Voters*, 468 U.S. at 382 (quoting *Thornhill* v. *Alabama*, 310 U.S. 88, 101-102 (1940)). Retaliation against public contractors for expressing views at public meetings and in newspaper editorials has, in contrast, never been identified in First Amendment jurisprudence as playing a beneficial role in fostering the political culture of the United States.

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speech of the employee from the disfavored political party, thus requiring analysis under both lines of authority. See, *e.g.*, C. Singer, *Conduct and Belief: Public Employees' First Amendment Rights to Free Expression and Political Affiliation*, 59 U. Chi. L. Rev. 897, 897-898, 918-923 (1992) (describing application of *Rutan* and *Pickering* to a hypothetical case involving both speech- and political-affiliation-based motives). This case requires no such dual analysis.

[23] See *Rutan*, 497 U.S. at 104-108 (Scalia, J., dissenting); *Branti*, 445 U.S. at 527-534 (Powell, J., dissenting); *Elrod*, 427 U.S. at 375-376 (Burger, J., dissenting); *id.* at 376-389 (Powell, J., dissenting).

C. In declining to recognize contractors' First Amendment claims, the Seventh Circuit relied in part on the risk that allowing such claims to proceed would "invite every disappointed bidder for a public contract to bring a federal suit against the government purchaser." *Downtown Auto Parks*, 938 F.2d at 709 (quoting *LaFalce*, 712 F.2d at 294). There are, however, few reported cases of non-patronage-related First Amendment claims by independent contractors,[24] notwithstanding that only the Seventh Circuit categorically bars such claims. The danger the Seventh Circuit identified is too speculative to justify eliminating constitutional protection altogether.

Where contracting with the federal government is concerned, the virtual absence of First Amendment claims may result from the fact that procedures for contracting by the Executive Branch are prescribed in detail by statutes and regulations.[25] Federal law generally re-

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[24] See, *e.g.*, *Blackburn* v. *City of Marshall*, 42 F.3d 925, (5th Cir. 1995); *Terminate Control Corp.* v. *Horowitz*, 28 F.3d 1335, 1353 (2d Cir. 1994); *Enplanar, Inc.* v. *Marsh*, 11 F.3d 1284, 1296 (5th Cir.), cert. denied, 115 S. Ct. 312 (1994); *Downtown Auto Parks*, *supra*; *White Plains Towing Corp.* v. *Patterson*, 991 F.2d 1049, 1057, 1061 (2d Cir. 1993); *Abercrombie* v. *City of Catoosa*, 896 F.2d 1228 (10th Cir. 1990).

[25] Government contracting law covers several broad categories of contracting, including (1) procurement of property, other than real property, (2) procurement of services, including research and development, and (3) construction, alteration, repair, or maintenance of real property. See 41 U.S.C. 405(b). The Armed Services Procurement Act of 1947 (ASPA), 10 U.S.C. 2301-2314, covers procurement for the Department of Defense, and the Federal Property and Administrative Services Act of 1949 (FPASA), 41 U.S.C. 251-260, covers procurement outside the military context. The Office of Federal Procurement Policy generally administers federal contracting law, including the ASPA and the FPASA. 41 U.S.C. 405a. Contracts for real property and automatic data processing and telecommunications equipment,

quires full and open competition for government contracts. See generally 10 U.S.C. 2304-2305; 41 U.S.C. 253(a), 253a, 253b.[26] The Federal Acquisition Regulations include hundreds of approved standard contract clauses for use in federal contracting, 48 C.F.R. Pt. 52, and use of those clauses helps to ensure fair and uniform contracts and to eliminate claims of unequal treatment.

The risk that disgruntled contractors will bring frivolous constitutional claims in federal court may also be diminished by the availability of federal administrative processes to resolve contractors' complaints of unfair treatment. See generally Contract Disputes Act of 1978 (CDA), 41 U.S.C. 601-613; 48 C.F.R. Pt. 33; 48 C.F.R. 52.233-1 to 52.233-2. Claims subject to administrative resolution include all claims against the government "relating to a contract." 41 U.S.C. 605(a).[27] Because the permissible reasons for adverse contract action are tightly circumscribed, see, *e.g.*, 48 C.F.R. 52.249-8, 52.249-10 (regarding contract termination), actions taken for impermissible reasons often can be resolved administratively under the contract.

The federal scheme illustrates that there are means by which to minimize the kind of discretionary decisionmaking that can lead to claims of unconstitutional treatment, and to provide appropriate mechanisms for resolving

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however, are administered by the General Services Administration, 40 U.S.C. 490(a)(12), 601-619, 759.

[26] Exceptions to the competitive requirements are made only in statutorily specified circumstances in which use of such requirements is not feasible. See *e.g.*, 10 U.S.C. 2304-2305; 41 U.S.C. 253(c)-(f), 254.

[27] A claimant may appeal to an agency board of contract appeals and then to the Federal Circuit, 41 U.S.C. 605(b), 606, 607(g), or, in lieu of such an appeal, may bring an action on the claim directly in the United States Claims Court, 41 U.S.C. 609.

contract disputes when they arise. The flood of First Amendment claims in federal court that the Seventh Circuit predicted has thus far been avoided under the federal government contracting system. In the absence of any demonstrated basis for believing that continued recognition of contractors' First Amendment rights is incompatible with efficient and effective government contracting, those rights should not completely be denied protection.

III. THE *PICKERING* BALANCING TEST IS INAPPLICABLE HERE BECAUSE RESPONDENT'S SPEECH DID NOT IMPAIR ANY SUPERVISORY OR MANAGERIAL FUNCTION

This Court's analysis of whether and when *Pickering* applies to public contractors must take into account both the legitimate interests of the government in ensuring effective contract performance and the constitutional rights of individuals who enter into contractual relationships with the government. The *Pickering* test reflects the fact that certain types of employee speech can impair managerial authority, and that ineffective management hinders the operations of government.[28] The same is true of contractor speech that impairs the effectiveness of governmental contracting officers in ensuring contract

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[28] To be protected under the *Pickering* test, a public employee's speech "must be on a matter of public concern, and the employee's interest in expressing herself on this matter must not be outweighed by any injury the speech could cause to '"the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."'" *Waters* v. *Churchill*, 114 S. Ct. 1878, 1884 (1994) (plurality opinion) (quoting *Connick* v. *Myers*, 461 U.S. 138, 142 (1983) (quoting *Pickering*, 391 U.S. at 568)). Whether speech addresses matters of public concern is a fact-specific inquiry based on the content, form and context of the speech. *Connick*, 461 U.S. at 147-148.

effectiveness. The courts of appeals that have addressed the question have thus held that, where the relationship between the government and the contractor is similar to a public employment relationship, *Pickering* should apply. See note 30, *infra*. Public contracting often, however, involves arms-length transactions between contracting officers and private businesses that do not implicate the structural concerns to which *Pickering* responds. In those contexts, *Pickering* does not supply the appropriate test.

A. *Pickering* is inapplicable here. Respondent's claim should be evaluated under the level of First Amendment scrutiny that generally applies to viewpoint-based conditions imposed on recipients of government benefits. Under that analysis, no public-concern threshold applies, and the government may only suppress speech where necessary to ensure effective government contracting.

The *Pickering* balancing test applicable to restrictions on public employee speech does not apply to non-employee speech such as respondent's, that takes place outside the workplace and does not impair the management abilities of governmental supervisors or contracting officers. The government's increased authority to regulate speech under the *Pickering* public employee speech doctrine derives from the need of government, when acting as an employer, to preserve the integrity of supervisory relationships and the smooth functioning of the government workplace. *Waters*, 114 S. Ct. at 1887-1888; *Rankin* v. *McPherson*, 483 U.S. 378, 384 (1987); *Connick* v. *Myers*, 461 U.S. 138, 151-152 (1983); *Pickering*, 391 U.S. at 568-570, 572-574. As this Court stated in *Connick*, "government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." 461 U.S.

at 146. Employees' workplace complaints can "threaten[] the authority of the employer to run the office." *Id.* at 153. The public employee speech doctrine accordingly establishes that "the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." *Id.* at 149.

The typical government-contract setting does not require prerogatives analogous to those that the employee speech cases seek to protect. Public contracts are generally performed outside of the government workplace, according to contractually established specifications, and without repeated and ongoing interaction between the governmental contracting officer or other governmental supervisory personnel and the contractor. This case is an apt illustration. Respondent contracted with the county for trash collection service at a specified price. He was not supervised by government personnel in the performance of that service, nor did he perform the contract in a government workplace, where he might have engaged in speech that undermined the authority of government supervisory personnel, such as by directly challenging supervisory credibility or distracting co-workers with discussions of personal workplace grievances. Cf. *Connick*, *supra*.[29] Even where public employee

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[29] Petitioners themselves distinguish arms-length contracting of the kind at issue here with the supervisory relationships inherent in public employment. Pet. Br. 18. As they describe it, "[t]he relationship between an employer and an employee differs significantly from the relationship between a principal and an independent contractor." *Ibid*. Whereas public employers must "maintain day to day control of the details of the manner in which the work is performed by employees," under many contracts, the government has a right to delivery of the end product, but "the contractor exercises the right to control the details on a daily basis." *Ibid*. Petitioners contend that those differences should entitle the government to greater latitude to

speech was at issue, the Court has recognized that the interest asserted in Pickering—preventing "immediate workplace disruption"—does not justify restrictions on speech that "does not involve the subject matter of government employment and takes place outside the workplace." *United States* v. *National Treasury Employees' Union (NTEU)*, 115 S. Ct. 1003, 1015 (1995).

Some government contractors are, for purposes of *Pickering*, in a role sufficiently similar to that of public employees that the *Pickering* test should apply to them. Courts of appeals have, therefore, consistently held that the limitations on speech that *Pickering* authorizes for public employees are appropriate for public contractors who operate under the ongoing managerial supervision of government personnel.[30] Although there are likely many

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rely on speech in terminating contracts. The logic of *Pickering*, however, suggests the opposite conclusion.

[30] See, *e.g.*, *Smith* v. *Cleburne County Hosp.*, 870 F.2d 1375, 1381 (8th Cir.) (applying *Pickering* to non-employee doctor with contract granting him staff privileges and responsibilities at public hospital because, "[w]hile there is not a direct salaried employment relationship, there is an association between the independent contractor doctor and the Hospital that have similarities to that of an employer-employee relationship."), cert. denied, 493 U.S. 847 (1989); *Caine* v. *Hardy*, 943 F.2d 1406, 1415-1416 (5th Cir. 1991) (en banc) (same), cert. denied, 493 U.S. 847 (1989); *Davis* v. *West Community Hospital*, 755 F.2d 455 (5th Cir. 1985) (same); *Copsey* v. *Swearingen*, 36 F.3d 1336, 1344 (5th Cir. 1994) (applying *Pickering* to non-employee vendor in program for the blind in State capitol building); *Havekost* v. *United States Dep't of the Navy*, 925 F.2d 316, 317-318 (9th Cir. 1991) (applying *Pickering* to non-employee grocery bagger licensed to work in Naval commissary).

Personal Service contracts provide an example, at the federal government level, of contractors who should be governed by *Pickering*. Under federal law, a "personal services contract" is one that, "by its express terms or as administered, makes the contractor personnel

situations in which the relationship between government and its public contractors is sufficiently intertwined to make a *Pickering* analysis applicable, this is not such a case.

That respondent's speech should not be subject to *Pickering* is underscored by the lack of a direct relationship between his speech and his contract obligations. Cf. *NTEU*, 115 S. Ct. at 1013 (noting that *Rankin* v. *McPherson*, 483 U.S. 378 (1987), "is the only case in which [the Court] applied the *Pickering* balance to speech whose content had nothing to do with the workplace"). Respondent's contract in this case was under the supervision of the county's Solid Waste Administrator. None of respondent's expression was directed at the Administrator, nor did respondent question the county's implementation of the contract. His public utterances primarily criticized county government on issues relating to open governance. Although respondent also addressed the continued operation of the county landfill and

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appear, in effect, [to be] Government employees," 48 C.F.R. 37.101, *i.e.*, one that is "characterized by the employer-employee relationship it creates," 48 C.F.R. 37.104(a). An employer-employee relationship is created where the government will "exercise relatively continuous supervision and control over the contractor personnel performing the contract." 48 C.F.R. 37.104(c)(2); see generally 48 C.F.R. 37.404 (detailing types of circumstances in which such control exists). Federal personal service contracts must be statutorily authorized, because "the Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws." 48 C.F.R. 37.104. "In no event," however, "may a contract be awarded for the performance of an inherently governmental function," 48 C.F.R. 37.102(b), *i.e.*, a function so intimately related to the public interest, such as one requiring the exercise of personal judgment and discretion, as to require performance by government employees, see OMB Circ. No. A-76, at ¶¶ 5(b), 6e (Aug. 4, 1993).

criticized proposed increases in landfill user rates, he did so as a citizen rather than a contractor.[31] Respondent's public speech therefore is not analogous to the kind of speech to which *Pickering* is addressed.

Where *Pickering* does not apply, the government nonetheless retains the ability to ensure effective performance of its contracts. The government has a vital interest in restricting contractors' activities that would interfere with the performance of a government contract. *NTEU*, 115 S. Ct. at 1016 ("operational efficiency is undoubtedly a vital governmental interest"). Where no less restrictive means than suppression of speech is available to protect it,[32] such an interest will satisfy the First Amendment standard.

B. Even if *Pickering* applied in this case, the judgment of the court of appeals reinstating respondent's First Amendment claim was correct. Respondent's expression met the *Connick* public-concern threshold, and the *Pickering* balance, if applicable, would tip decidedly in his favor. Petitioners clearly err in their assertion that,

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[31] See *Pickering*, 391 U.S. at 574 (where "the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication," the plaintiff must be regarded "as the member of the general public he seeks to be"). To be sure, just as the teacher in *Pickering* was knowledgeable about the operation of the school system because he was a teacher, *id.* at 571-572, respondent, due to his role as the county's trash collector, may have been more knowledgeable than the average county resident regarding landfill issues.

[32] If contractors' self-expression would otherwise be mistaken for speech by or on behalf of the government, we believe that the government may, consistent with the First Amendment, require the contractor to make clear that the government does not endorse the contractor's message. Cf. *Capitol Square Review and Advisory Bd.* v. *Pinette*, 115 S. Ct. 2442, 2450 (1995).

"[h]ad [respondent] been an employee he could have been fired for insubordination for the remarks he made in county commission meetings, despite the public interest in the issues at stake, under the balancing test of *Pickering*." Pet. Br. 22.

The matters upon which respondent spoke at the Board meetings and in the newspapers were not, as petitioners claim (Pet. Br. 32), "personal matters," but were issues of public concern. Petitioners' non-compliance with state law regarding open meetings and open records is, in the judgment of the State's own legislature, a matter of importance to the proper administration of state and local government. Questions regarding the continued functioning and financing of the county landfill were also of public concern. The lack of an operating landfill in the county could, as respondent pointed out in his column, result in greater illegal roadside refuse dumping, C.A. App. 57, and if the landfill remained open but substantially increased its rates, the residents themselves could pay higher fees, *id.* at 106-107. The public at large could readily be expected to have an interest in hearing about issues that could thus affect their wallets and the cleanliness of their environment. There is also no evidence that respondent's speech interfered in any way with performance of the trash hauling service under the contract, and thus no factual basis for a conclusion under *Pickering* that a government interest outweighed respondent's right to speak out on matters of public concern.

CONCLUSION

The judgment of the court of appeals should be affirmed, and the case remanded for further proceedings.

Respectfully submitted.

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